IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 543 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANTIBHAI A THAKKAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR KB ANANDJIWALA for Appellant(s) : 1,MR PM THAKKAR for Appellant(s) : 1,MS NK ANANDJIWALA for Appellant(s) : 1,
MS DARSHANA PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 18/06/2007

ORAL JUDGMENT

1. The appellant Kantilal A.Thakkar-original accused of Special (ACB) Case No. 16/1990 has

preferred this appeal under section 374 of CrPC challenging the legality and validity of the order of conviction and sentence dated 21.04.1992 passed by the ld. Special Judge, Ahmedabad whereby the appellant-accused (hereinafter referred to as the accused or appellant) has been held guilty for the offence punishable under section 161 of IPC and also under section 5(1)(d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as the PC Act. The ld. Trial Judge, vide judgment under challenge, sentenced the appellant accused to undergo S/I for 2 Years and to pay a fine of Rs.1000/, I/d to undergo further S/I for 3 months for the offence punishable under section 161 of IPC and also sentenced the appellant accused to undergo S/I for 2 Years and to pay a fine of Rs.1000/, I/d to undergo further S/I for 3 months for the offence punishable under section 5(1)(d) of the PC Act.

2. The accused was also tried pending trial for the same offence before the same Court in the capacity of the accused of Special Case No. 17/1989 for his alleged involvement in demanding and accepting

illegal gratification of Rs.50/ on 15.03.1985. In that case, the accused was held guilty and order of conviction and sentence was also recorded against the appellant-accused. The date of judgment recording conviction and sentence in that case as well as date of judgment recording conviction and sentence of the appellant accused in the present case is same, but as both the cases were tried separately and have been considered as separate and different trial, the present appeal is preferred by the appellant accused challenging the judgment recording conviction and sentence in Special Case No.16/1989. Of course, the facts placed in the present case clearly reveal that the complainant of Special Case No.17/1989 was recorded prior to the complaint in the present case and after successful trap in Special Case No.17/1989, fresh proceedings against the accused in the present case were initiated by the same officer viz. Mr. Jadav, PI, ACB and members of the raiding party. Two panchas who were called to stand as panchas in earlier case i.e. Special Case No. 17/1989, were requested to act as panch witnesses in the present case i.e. Special Case No.16/1990. The allegation

against the accused in Special Case No.17/1989 was that the accused demanded and accepted illegal gratification of Rs.50/ from another complainant namely Anwarbhai for issuing injury certificate incriminating against the accused assailant of Anwarbhai. It appears from the language of para-1 of the judgment under challenge in the present case that the judgment of conviction and sentence was dictated by the Presiding Judge keeping the formality of declaring the same in the open Court reserved as it is found observed in the present case that “..... for which this Court by the judgment and order of even date has sentenced him to undergo the punishment that was also an incident of 25.03.1985 in the afternoon hours. On the same day in the late evening hours, this very accused has been caught red-handed for having accepted illegal gratification in the sum of Rs.20/ upon demand from the complainant herein as charge for treatment of the uncle of the complainant.

3. The judgment under challenge has been assailed on various grounds mentioned in para-2 of the memo of the appeal. Mr. Anandjiwala, ld. Counsel appearing

for the appellant accused has taken me through main grounds of challenge and so also the judgment under challenge. He has also taken me through three vital documents namely complaint, panchanama of recovery of muddamal currency notes from the pocket of the accused and case papers exh.40, along with oral evidence led during the course of trial. According to Mr. Anandjiwala, the finding recorded by the ld. Trial Judge is based on incorrect, illegal and erroneous appreciation of the evidence and the finding is based on mere conjecture and surmises and as such there was no legal and satisfactory evidence to link the accused with the crime. It appears that the plain reading of the judgment clearly indicates that as a Presiding Officer of the Court was morally convinced and accused has been held guilty even though there was no linking evidence to that effect.

4. Ld. APP Ms. Pandit has strongly supported the judgment and according to her, the order of conviction should be upheld because there was no reason for the complainant to implicate the accused falsely in such a serious offence. According to her,

the complainant was not knowing even that a successful raid has been completed by Mr. Jadav, PI, ACB in Casualty Ward. The complainant had brought his maternal uncle Vinodchandra for treatment in emergency ward as he has sustained injuries and thereafter, patient Vinodchandra was referred to ENT Ward of Civil Hospital. Accused was on duty in the emergency ward. When the complainant found from the doctor on duty in ENT ward that doctor on duty in emergency ward has wrongly charged him for Rs.20/ for treating the patient Vinodchandra, he had gone to emergency ward to get his amount back from the doctor to whom he had paid. His doctor was none-else but the same person who was trapped by PI Mr. Jadav. In this background of facts, the ld. Trial Judge has not committed any error in appreciating the version of the complainant Sandip and on sole testimony of this witness, the accused can be held guilty. The say of the complainant was that he had given two new currency notes of Rs.10/ denomination to the doctor and during search, the complainant was able to identify those two currency notes from total six currency notes of Rs.10/ denomination that were found

from the pocket of the accused. These very currency notes were recovered by PI Mr. Jadav. The case papers were produced sufficiently corroborates the complainant Sandip. According to Ms. Pandit, it is not necessary that in all ACB cases, the trap should be arranged in a manner so that some scientific evidence can corroborate the say of the complainant and/or panch. The evidence of defence witness does not carry the case of the prosecution any further because the defence witness has simply produced one circular issued in the year 1971. The present incident was of March 1985. So, it would not be safe for the Court to accept that very circular was in force even in the year 1985. For short, according to Ms. Pandit, conviction should be upheld because as such there is no error in appreciating the evidence of complainant Sandip.

5. To appreciate the rival contention, firstly, it would be appropriate to state the basic facts giving rise to the present case. The facts have been stated in para-2 of the judgment under challenge and for the sake of brevity, I would like to reproduce the relevant part of para-2 for the purpose:-

That the complainant Sandip Chinubhai Parikh on 25.03.1985 lodged a complaint with Anti-Corruption Bureau Office at Ahmedabad to the effect that his uncle (maternal uncle) Vinodchandra Govindlal Shah was taken by him to the Civil Hospital along with other relatives, for getting him treatment at the Civil Hospital, Ahmedabad for the injuries sustained by his uncle; on reaching the hospital, he was directed by the Casual Medical Officer, whom he approached first, to meet the Medical Officer on Duty in Room No.25 (the accused herein), the accused examined the uncle of the complainant and treated him but for that he allegedly demanded gratification in the sum of Rs.20/ on the pretext that it is a charge which he has to pay him for getting appropriate certificate. Thereupon the complainant paid him the sum of Rs.20/ in the form of two currency notes of Rs.10/ each. After that in the afternoon, on completion of treatment to his uncle, when the complainant inquired while returning, he came to know that for treatment of patients in the Civil Hospital at Ahmedabad, no charges are collected from them and hence he visited the accused in Room No.25 when he

came to know that some ACB Investigations are going on against the accused (in connection with another trap case being Special Case No.17/1989) for having accepted illegal gratification from another complainant patient. Therefore, he waited for some time and at about 6 O'clock when those investigations were over, he demanded back the sum of Rs.20/ paid by him to the accused to which the accused told him that he would give it after some time. In the meanwhile, PI of ACB who was investigating the previous case reached the spot and inquired of the matter with the complainant herein who divulged the facts to him and thereupon his complaint was recorded and the same panch witnesses, whose services were requisitioned in the previous case, were utilized and upon search of the accused the two currency notes of Rs.20/ paid and accepted by the accused were recovered, which were identified by the complainant herein as having been given by him. Thereupon, another trap panchanama was drawn, investigation were set in motion. After completion of investigation, as stated earlier, the appellant accused came to be tried and at the conclusion of trial, appellant accused was convicted

and sentenced vide judgment under challenge as aforesaid.

6. The charge is at exh.7 and to prove the charge, the prosecution has examined three witnesses namely PW.1 complainant Mr. Sandip Parikh (exh.13), PW.2 panch Mr. Mahesh Chimanlal Patel and PW.3 Mr. Kanchan Ratilal Jadav, PI; trap-cum-investigating officer. I have carefully gone through the evidence of these three witnesses and also the version of defence witness Mr. Subhash Zala, Exh.24.

7. It is rightly observed by ld. Trial Judge in the beginning of the oral judgment that this is a very peculiar case against the accused and the case of the prosecution is very simple. As such, there is no dispute that the accused was a public servant serving as Medical Officer in Civil Hospital at Ahmedabad in Room NO.25 and that room was considered as Casualty-Emergency Ward. It is also not a matter of dispute that one patient Vinodchandra Shah had been to Civil Hospital on 25.03.1985. This Vinodchandra, according to the case of the prosecution, was the maternal uncle of complainant Sandip and he had received

injuries at Dahegam and, therefore, this Vinodchandra was brought to Civil Hospital, Ahmedabad by relatives for treatment and complainant Sandip was one of them. The doctor who had examined the patient Vinodchandra had told the complainant that he would make helpful endorsement. After some treatment, the patient was sent to ENT ward. However, he i.e. doctor on duty, told him that he would make helpful endorsement and demanded Rs.20/. It is the say of Mr. Sandip-complainant that thereupon his uncle took out two currency notes and they were given to the accused and those notes were kept in the left side pocket of bushirt of the accused. At that time, his maternal uncle Mr. Vinodchandra Shah, two maternal aunts Renuka and Bhavna as well as maternal grand mother Padmaben were present. From the plain reading of the deposition of Mr. Sandip and the complaint Mark-A, it is clear that witness Sandip has made certain material improvement while deposing before the Court and crucial facts that he could have stated in the complaint. In that complaint, there is no reference of alleged incident near Dahegam by ST Bus nor it is mentioned that after alleged accidental injury,

maternal uncle of complainant Mr. Sandip had taken primary treatment at Dahegam Hospital. It is also not mentioned that after the treatment at Dahegam, Vinodchandra was not feeling comfortable and so he was brought to Civil Hospital, Ahmedabad. In the deposition before the Court, he has stated that on 25.03.1985, Vinodchandra had sustained accidental injuries by ST Bus and after taking treatment at Dahegam, he had come down to Ahmedabad. Thereafter, Vinodchandra was not comfortable and he was brought to Civil Hospital at about 12.00 noon and the case papers were issued by hospital authorities. In the complaint, it is stated that they had come to Civil Hospital at about 2.30 p.m. and had entered casualty-emergency ward i.e. Room No.25 at about 2.30 p.m. In the complaint, it is stated that he had ascertained and was satisfied that no charges are being recovered or taken for the treatment and, therefore, at about 5.30 p.m., he had gone to Room No.25 of Dr. Thakkar-appellant accused for refund/recovery of Rs.20/ paid by him to Dr. Thakkar initially in the afternoon. It emerges that when he had reached Room No.25 of Dr. Thakkar, the proceedings in respect of one anti-

corruption trap arranged by PI Mr. Jadav were going on and thereafter, he tried to approach the accused i.e. Dr. Thakkar. At that time, Dr. Thakkar told him that he would refund the amount on the next day and at that time, his maternal uncle Vinodchandra was present. Meaning thereby, Mr. Vinodchandra Shah had followed the complainant when he had left ENT ward for that very purpose.

8. It is the say of the complainant that when he had gone to ENT ward with Mr. Vinodchandra, at that time the doctor on duty belonged to Saurashtra informed him during conversation that patients have not to pay in Civil Hospital and if the complainant has paid Rs.20/, then he has wrongly paid. Mr. Vinodchandra was treated there. Medicines were also purchased from the medical store situated within the premises of Civil Hospital and at that time it was about 5.00 p.m. This indicates that at 5.00 p.m., trap against Dr. Thakkar was already laid and if a doctor is trapped by ACB officer, then it can reasonably be inferred that the person in the nearby area would have learnt about such a explosive information. The crucial question which was required

to be considered by the trial Court was that if the amount was taken by Dr. Thakkar at any time after 12.00 noon or at about 2.30 p.m., why complainant Mr. Sandip waited for recovery of the amount till 5.00 p.m. The explanation coming forward from the complainant is not found convincing that he was busy in the treatment of his maternal uncle Vinodchandra and he spent certain hours in purchasing medicines etc. The case papers exh.14 do not show the exact time as to when it was issued by Civil Hospital. They are outdoor case papers and the endorsement made at the back side of the case papers does not speak anything grave about the injury. The endorsement on the reverse side appears to have been made by ENT doctor and Mr. Vinodchandra was found normal. He was prescribed Ampicilin capsule and two other tablets. No external marks of injuries were seen. As per PW No.1 Sandip, when his maternal uncle was examined by Dr. Thakkar, one lady doctor was sitting on a chair adjacent to the chair of Dr. Thakkar and two ward boys were also standing at the door. This witness has denied the suggestion that he shall have to deposit necessary fees for registration of medico-legal case.

The case papers used for the purpose i.e. Exh.14, could have been used for the patients who are supposed to pay because it refers two categories, viz; (i)with charges-fees (“Mulyapatra”), (ii) Free (“Mafat”). One was required to be scored off, but the same is not found scored off/erased. The doctor who had informed the complainant during conversation that in Civil Hospital fees are not required to be paid, has not been named by the complainant for the reasons best known to him. On one hand, he claims that doctor belong to his area i.e. Saurashtra region and he had informed him that no amount is required to be paid as fees, then he could have mentioned the name of the doctor in the complaint. It can be inferred reasonably that somebody or perhaps the complainant himself must have told that doctor treating Mr. Vinodchandra in the ENT ward that they had paid fees of Rs.20/; meaning thereby that the doctor was the first person to whom alleged illegal recovery of the amount of Rs.20/ was brought to the notice. This doctor was a crucial and important witness because this is not a case of arranged trap. In the same way, as alleged, Rs.20/ were demanded by the doctor in the

presence of Mr. Vinodchandra and the demand was also made in the presence of real sisters of Mr. Vinodchandra. Statement of Mr. Vindochandra was recorded by Mr. Jadav, PI of ACB. However, this Mr. Vinodchandra has not been examined in the present case.

9. Mr. Vinodchandra was present on both the occasions; firstly when Rs.20/ were demanded and paid and secondly at about 5.30 p.m. or 6.00 p.m. in the evening when the complainant Mr. Sandip had gone for recovery/refund of the very amount. When it is the say of the complainant that in presence of Mr. Vinodchandra accused had replied that he shall re-pay/return the amount on the next day, then the prosecution ought to have examined Mr. Vinodchandra to get corroborative piece of evidence to the version of Mr. Vinodchandra. The crucial question is whether Mr. Vinodchandra should be believed in absence of any corroborative piece of evidence qua the demand made of illegal gratification because it is nobody's case that out of several people gathered near the emergency ward, any one had over-heard the conversation between complainant Mr. Sandip and Dr.

Thakkar in the evening. Lady doctor has not been examined. The prosecution has also not even shown whether at the time of payment of Rs.20/, said lady doctor was present or not. It is very likely that the say of Mr. Sandip before the Court may be true narration of the events occurred after 12.00 noon and at about 2.30 p.m. Or any time prior thereto, but as per established principles of criminal jurisprudence, our courts have drawn clear distinction between “may” and “must”. Whether it was safe for the ld. Trial Judge to accept the say of Mr. Sandip as gospel truth was the question. This is a case of uncorroborated testimony of the complainant who himself has improved a lot and has attempted to modulate the version. He has tried to keep curtain on some aspects. On the contrary, indirectly, it emerges that Mr. Sandip must have tried to get some favourable endorsement either from Dr. Thakkar or from the doctor who had examined Mr. Vinodchandra. A complainant who had stated in his complaint that they had been to Civil Hospital because of some complication in throat of Mr. Vindochandra and has not referred anything about the motor vehicle

accident and that too by ST bus, why this witness should be believed considering the time gap between the alleged demand of illegal gratification of Rs.20/ by the accused doctor and his attempt to express his grievance against the very doctor before the ACB officials and in my view, it would be risky to accept the sole testimony of such witness as gospel truth.

10. As mentioned earlier, this is not a case based on an arranged trap. Two different currency notes of Rs.10/ denomination have been recovered as notes allegedly given by the complainant to the doctor before some hours. The say of the complainant is that the amount paid by him was kept by the doctor in upper left side pocket of the bushirt. How this would help the prosecution, is the question because six notes of Rs.10/ denomination were in the pocket of the doctor when searched. For the reasons best known to the prosecution, copy of the panchanama drawn earlier in point of time which was produced in Special ACB Case No.17/1989 has not been produced in the present case. But there is some force in the arguments of ld. Counsel Mr. Anandjiwala that this Court can not shut eyes because the trial Judge has

referred the proceedings of Sessions Case No.17/1989 in the present case at more than one places. It appears that mind of the ld. Presiding Judge was under great influence of the evidence recorded in Special Case No.17/1989. It is the say of Mr. Jadav as well as panch witness that panchanama in ACB Case No.17/1989 was drawn and it was completed at about 6.00 p.m. and muddamal currency notes which were found from the pocket of the doctor i.e. Rs.167.50ps. were returned back to the doctor. So, the recovery of Rs.167.50 ps. as muddamal currency notes from Dr. Thakkar was a fact which was within the knowledge of the trap officer as well as panchas. There was no reason to keep the entire amount as muddamal currency notes or the amount collected as illegal gratification. It is the say of the complainant that he was able to identify the notes given by him to the accused doctor because of certain specific marks of identification. The claim of the complainant is that those notes were new. If the say of the complainant was that that currency notes given by him were new currency notes, then Mr. Jadav ought to have asked a pointed question to the complainant whether any other

currency notes of same series and if possible any single note having preceding or succeeding number was recovered or not. Even panchas were not sure that both currency notes identified by the complainant are new currency notes and, therefore only, it is mentioned in the panchanama that one out of two currency notes is comparatively new compared to another one. Number of notes are totally different and are of different series. Whether it was safe for the ld. Trial Judge to accept the say of the complainant that he was right in identifying two currency notes out of total six currency notes found from the pocket of the doctor at the time of drawing of panchanama, in absence of identification marks? The answer would be in the negative. If such complainants are believed, then no public servant would remain safe and Rs.10/ denomination notes are so common that any class:III or IV government servant also may have notes of Rs.10/ denomination in their pockets. Therefore only, the Courts are insisting that there must be some assistance of the evidence of scientific nature. Mr. Anandjiwala has rightly placed reliance on the decision in the case of **Gangakumar**

Shrivastava v/s State of Bihar, 2005 SCC (Cri.) 1424, because the court should insist for conclusive evidence about the payment of bribe amount. Placing reliance on the observations made by the Apex Court in the case of ***Som Prakash v/s State of Delhi, (1974)4 SCC 84 : 1974 SCC (Cri) 215 and Raghbir Singh v/s State of Punjab, (1976)1 SCC 145 : 1975 SCC (Cri) 776,*** the Apex Court has observed that as the currency notes in question used in trap were without treating the same with phenolphthalein powder, the concurrent findings of courts below can not sustain. The evidence of scientific nature was also not found satisfactory as the muddamal currency notes were recovered from the pocket of bushirt. However, the hands of the accused were stained with phenolphthalein powder. For the sake of brevity and convenience, three paragraphs read over to the Court by ld. Counsel Mr. Anandjiewala are quoted herein below:-

> 19. Let us now turn to another aspect of the matter. Let us examine whether the evidence from the prosecution side conclusively proved payment of Rs.150/- by the complainant to the appellant on 28th of June, 1985 in presence of two witnesses and the watcher. On this also,

we are of the view that the High Court and the Special Judge were in error by holding that the prosecution had been able to prove its case to the hilt. It is true that in the statement made under section 313 of the Cr.P.C. the appellant admitted the presence of the watcher and the complainant on 28th June, 1985 but his defence was that as soon as he put on the flying shirt hanging on the peg he was caught and was forced to sit in the standing car. The defence case was that taking advantage of the absence of the appellant the money was kept in the pocket of the flying shirt of the appellant and he was caught as soon as he came out and put on the flying shirt. It is also true that it was not disputed by the appellant that on 28th June, 1985 Rs.150/- was recovered from the flying shirt of the appellant. It was also not disputed that such recovery was made in presence of the complainant and the watcher. Therefore, the examination by the courts below was that whether in fact the money was kept by the complainant in absence of the appellant in the flying shirt. In this connection prosecution had sought to prove this case by producing PW-5 the watcher and the complainant PW-6. It is true that these two witnesses fully supported the demand and acceptance of the amount by the appellant but it is an admitted position that (P.W.10) K.K. Verma, Dy. S.P. who had investigated the case admitted in his

evidence that the watcher had told him that the appellant had come in ganji and lungi @page-SC3130 and had put on the bushshirt hanging in the room where he was sitting. Evidence on the part of K.K. Verma (PW-10) was sought to be explained by the courts below by saying that the fault in recording statement of the watcher by the I.O. was acceptable. In view of the aforesaid admission of the watcher that the appellant came with ganji and lungi, as admitted by PW-5 before PW-10 it would be difficult for us not to accept the version of the appellant that the notes were planted by the complainant in presence of the watcher before the appellant had entered the room where the complainant and the watcher were sitting. There is no dispute in this case that phenolphthalein powder was not used by the vigilance to prosecute the case on the alleged recovered notes for the purpose of charging the appellant for bribe. In *Som Prakash v. State of Delhi (1974) 4 SCC 84,* it was observed:

> "It is but meet that science-oriented detection of crime is made a massive programme of police, for in our technological age nothing more primitive can be conceived of than denying the discoveries of the sciences as aids to crime suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only, thereby

discouraging liberal use of scientific research to prove guilt."

In *Raghbir Singh v. State of Punjab (1976) 1 SCC 145,* while discarding the oral and documentary evidence laid on behalf of the prosecution is not such as to inspire confidence in the mind of the court, the Supreme Court observed at paragraph 11 as follows:

"We may take this opportunity of pointing out that it would be desirable if in cases of this kind where a trap is laid for a public servant, the marked current notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the court does not have to depend on oral evidence which is something of a dubious character for the purpose of deciding the fate of the public servant." (Emphasis is ours)

20. We must not forget that in a trap case the duty of the officer to prove the allegations made against a Government Officer for taking bribe is serious, and therefore, the officers functioning in the Vigilance

Department must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the Court is not left in any doubt whether or not any money was paid to the public servant by way of bribe. It is also the duty of the officers in the Vigilance Department to safeguard for the protection of public servants against whom a trap case may have been laid.

21. In view of the discussions made and the decisions of the court above, we are of the opinion that considering the fact that the present case was also a case of trap of a public servant a duty was cast upon the authorities to use phenolphthalein powder for the purpose of proving the charge of bribe of the appellant without relying only on the oral and documentary evidence adduced from the side of the prosecution. Therefore, in our view, where admittedly the recovered notes were not treated with phenolphthalein powder so that the handing of such marked notes by the appellant could be detected by chemical process and the court need not have to depend on the oral evidence which is something of a dubious character to decide the fate of a public servant. Keeping the aforesaid in our mind, we are of the view that the defence was much more probable. Defence case was that the bushshirt hanging in the peg

> where the complainant came, the appellant was at that point of time asleep in the next room and father of the appellant went to wake him up and at that point of time the notes were thrust into the pocket of the hanging bushshirt, which the appellant wore when he came to the outer room as he was in his ganji and lungi. In view of our discussions made herein above, we are of the view that the defence case must be held to be probable. Accordingly, we must hold that in the light of the discussions made herein above, the evidence led on behalf of the prosecution was not such as to inspire confidence in the mind of this Court, and therefore, we are not at all satisfied that the appellant either demanded Rs.150/- from the complainant or the complainant paid bribe to the appellant by handing over two marked currency notes to him."

The observations made in para-20, in my view are more relevant because in the present case, the prosecution is insisting for confirmation of the order of conviction in a case where identity of muddamal currency notes recovered from the pocket of the accused from the bunch of currency notes handed over by PI,ACB himself before some minutes, is under great shadow of doubt. If panchanama exh.16 is read closely, then a cause for drawing panchanama itself goes under shadow of doubt. It is alleged that when

PI Mr. Jadav was coming out of Room No.25, he show accused talking something with Sandipbhai. How the accused was out of that room prior to the trap officer and other members of the raiding party or panch witness? This question has not been properly answered. How and why PI Mr. Jadav was tempted to know the cause or subject of talk between Sandip and the accused doctor again is a question not answered properly. So, according to the panchanama, Dr. Jadav was responded by Mr. Sandip is the case of the prosecution. Now the panchanama says that in response to the query, Mr. Sandip and his relatives Mr. Vinodchandra, Bhavnaben, Renukaben and Padmaben told that for treatment of Mr. Vindochandra, Rs.20/ were demanded and taken away by Dr. Thakkar and this amount was in two currency notes of Rs.10/ denomination. According to panch, this fact was read over by Mr. Jadav to panch witness. Thus, Mr. Sandip was one of the person who had expressed alleged grievance to Mr. Jadav. Thus, Mr. Vinodchandra was the best person who could have led corroborative piece of evidence to convict the accused including the identity of the currency notes. For the sake of arguments, even if it is accepted that that version of Mr. Vinodchandra would have corroborated the

version of Mr. Sandip, even then, I am afraid, the Court could not have linked the accused with the crime for want of cogent and conclusive evidence. Personal search of the accused in the present case can be considered to be an independent objective search and so also seizure, is the question and answer thereof obviously is in the negative in view of the background of the facts of earlier panchanama.

11. This Court can not ignore one fact that today, this Court has acquitted the present appellant accused allowing his Criminal Appeal No.544/1992 challenging the judgment and order of conviction & sentence recorded by Spl.Judge in Special Case No. 17/1989. It is relevant to note that the hand of the doctor accused was not found stained with anthracene powder and it was ultimately a case of mere recovery and not the case of conclusive proof of recovery of the amount of illegal gratification from the accused.

12. In the present case, on the strength of the evidence of Mr. Vinodchandra, the accused at the most could have been questioned for demand of illegal gratification. The evidence led by the defence witness is sufficient to raise a shadow of doubt even

on the case of demand of illegal gratification. Circular of 1971 produced by the defence witness at exh.25 clearly states that the doctors in Civil Hospital are entitled to recover certain charges. Such cases are enumerated in the circular. Mr. Vinodchandra had been to Civil Hospital to get an injury certificate so that the same can be used against ST Corporation perhaps in a compensation case. A certificate which can be used as MLC in a criminal case if registered against the accused driver of ST bus, was to be given by Dahegam Hospital where Mr. Vinodchandra was allegedly treated. Whether this circular was effective in the month of March-1985 was the question. Mr. Anandjiwala has consented that he had no objection if the response of ld. APP in this regard is based on concrete instructions from the responsible government officer, is taken into consideration. For the purpose, ld. APP sought some time and thereafter the matter was again fixed for further hearing. On the next date, upon instructions received from the office of the Director of Health, ld. APP has submitted that in the year 1972, doctors were given option and the doctors who have not opted for Non-Practicing Allowance (NPA), they were entitled to recover fees-charges and no

specific circular was issued till March 1985 nullifying the effect of the circular of 1971 tendered in evidence at exh.25 by the defence witness. So, Rs.16/ could have been demanded or recovered by the accused on the basis of the circular. There is no evidence on record to show that the accused had opted for NPA or not. This contingency sounds good otherwise PI Mr. Jadav would not have returned Rs.167.50 ps. To the accused doctor on completion of drawing of panchanama which was produced in ACB Case No.17/1989.

13. Mr. Anandjiwala, ld. Counsel appearing for the appellant accused has assailed the selection of panchas and has argued that both the panchas were under the influence of PI Mr. Jadav and they were called by Mr. Jadav even in respect of first case of arranged trap. It is also argued that to draw a panchanama in the present case, Mr. Jadav could have called any independent person as panchas because out of number of persons present and available in Civil Hospital premises, many of them might be government servants and there was no need to repeat these two panchas. Without commenting on this part of evidence, at least, in view of above set of facts, it is necessary to observe that the finding of the guilt

recorded by the ld. Trial Judge is based on mere conjecture and surmises. No evidence of cogent and convincing nature was available to link the accused with the crime and especially with muddamal currency notes of Rs.10/ denomination allegedly identified by the complainant Mr. Sandip as the amount given by him against the illegal gratification -bribe amount. Rs.20/ recovered in the present case may be the amount allegedly given for treating Mr. Vinodchandra, but such “may” can not take place of “must” i.e. can not take place of a positive proof and, therefore, the accused requires to be given benefit of doubt. Appeal, therefore, requires to be allowed in view of discussion made above.

14. Before parting with the judgment, I would like to observe that in a given case, at the most department could have initiated effective proceedings against the accused doctor and if department was satisfied that though the doctor was not entitled to recover any amount as he was receiving NPA and any circular including circular of 1971 (exh.25) would not have helped the accused, then he could have been subjected to any departmental proceedings. The standard of proof in departmental proceedings is not

much strict as required in a criminal case. So, even if the Court is of the view that effective steps could have been taken by the department, that fact by itself would not be sufficient to confirm the finding of guilty against the appellant accused.

15. For the reasons aforesaid,the present Criminal Appeal is allowed. The impugned judgment and order of conviction and sentence dated 21.04.1992 passed by the ld. Special Judge, Ahmedabad in Special Case No.16/1990 is hereby quashed and set aside. The appellant accused is hereby given benefit of doubt and is acquitted from the offences for which he has been charged, held guilty and convicted by the ld. Trial Judge vide the judgment under challenge. Fine if paid, be refunded to the appellant accused on proper identification. The appellant accused is on bail, his bail-bonds stand discharged.

[C.K. BUCH, J]

***rawal**